88-1462 (1)

NO.

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1988

T. SMITH & SONS, INC., ET AL,
Petitioner

V.

JULES SIMEON, SR. AND IDA MAE GRIFFIN SIMEON, AND LUMAR MARINE, INC.
Respondents

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI

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## Question Presented

Whether the rule of Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946), which provides for several liability of joint tortfeasors held to different standards of care, extends to a defendant whose liability stems from general maritime negligence and a defendant whose liability stems from Jones Act negligence based on the great disparity in the degree of fault necessary to impute liability under these two negligence theories and the Supreme Court doctrine that damages in admiralty are given and withheld upon enlarged principles of justice and equity.

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October Term, 1988

T. SMITH & SONS, INC., ET AL,
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# PETITION FOR A WRIT OF CERTIORARI

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T. Smith & Sons, Inc., petitioner, hereby petitions the Court to issue a writ

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* Midland Insurance Company, insurer of the petitioner, was a named defendant in the proceeding before the District Court for the Eastern District of Louisiana.

Midland Insurance Co. is not a party to these proceedings. T. Smith & Sons, Inc. is the sole petitioner as in rem service was never effected upon their Derrick Barge PENNY. T. Smith & Sons, Inc. is the corporate predecessor in interest of Cooper/T. Smith Stevedoring Company, Inc.

of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered on August 10, 1988.

## OPINIONS BELOW

The opinion of the Court of Appeals, which is reproduced in Appendix A commencing at page A-1, is reported as Simeon v. T. Smith & Son, Inc., v. Lumar Marine, Inc., 852 F.2d 1421 (5th Cir. 1988). The Order of the Court of Appeals denying a Petition for Rehearing en banc is reproduced in Appendix B commencing at Page A-164. Findings of Fact and Conclusions of Law by the United States District Court is reproduced in Appendix C commencing at page A-168. The judgment of

the district court is reproduced in Appendix D commencing at Page A-195.

## JURISDICTIONAL GROUNDS

The decision of the United States Court of Appeals for the Fifth Circuit was entered August 10, 1988. An application for rehearing en banc was denied on November 17, 1988. This court has jurisdiction to review the decision of the Court of Appeals pursuant to 28 U.S.C. §1254(1).

## STATUTORY PROVISIONS INVOLVED

46 U.S.C. §688 provides in pertinent part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action

> all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply ...

## STATEMENT OF THE CASE

1. Preliminary statement

This case presents the issue of whether joint liability should be imposed on two defendants, one of which is insolvent or approaching insolvency, following the general adoption of comparative fault principles by the Court in maritime cases. The inequity of casting one party in judgment for a sum greater than its percentage share of fault bears to the plaintiff's total damages is compounded in this case by the fact that the solvent defendant, as the plaintiff's employer, owed the plaintiff a far higher standard of

care than its co-defendant. The District Court's entry of a several judgment in this case was consonant with the comparative fault principles applied by this and other courts, and also was equitable considering how the plaintiff, by not pursuing his maritime lien claim, irrevocably prejudiced any contribution claim which would result from the entry of a joint judgment.

The United States Court of Appeals for the Fifth Circuit ("court of appeals") reversed the entry of a several judgment for those elements of damage for which both defendants were liable. With respect, the confusing opinion of the court of appeals, which attempted to reconcile joint liability to defendants which were not liable for the same elements of damage under substantive law, were not liable for

the same quantum of damages, which owed the plaintiff far different standards of care, and where the plaintiff's fault contributed to his injuries, reached an inequitable result without furthering a significant social purpose. By entering a joint and several judgment, the court of appeals simply ensured the plaintiff's recovery of his non-economic, pain and suffering damage award from a solvent defendant. However, the several judgment entered by the District Court against the solvent defendant was more than adequate to compensate the plaintiff for his economic damages, including past and future lost wages, as well as future medical expenses.

2. Course of Proceedings

This case originated in the United States District Court for the Eastern District of Louisiana when Jules Simeon, Sr. and Ida Mae Griffin Simeon brought suit against Lumar Marine, Inc. ("Lumar") for negligence under the general maritime law, and against Mr. Simeon's employer, T. Smith & Sons, Inc. ("T. Smith") for unseaworthiness under the general maritime law and Jones Act negligence, 46 U.S.C. §688. This suit was brought for injuries sustained by Mr. Simeon on September 27, 1981 while working as a deckhand aboard the T. Smith derrick barge PENNY.

The jury rendered a verdict finding Jones Act negligence on the part of T. Smith, but no unseaworthiness of its derrick barge PENNY. T. Smith was found to

be fifty-eight percent responsible for Mr. Simeon's injuries. Lumar was found to be thirty-two percent responsible for the accident due to the negligence of the crew of the M/V TAKO BANDIT, which was responsible for shifting barges being discharged by the derrick barge PENNY. Mr. Simeon was found by the jury to be ten percent responsible for his own accident.

Mr. Simeon's pecuniary losses totalled less than $130,000. Mr. Simeon was awarded $1.25 million for pain and suffering, which was remitted by the District Court to $750,000. The District Court properly refused to enter a joint judgment against Lumar and Smith and held each defendant severally liable for its respective portion of Mr. Simeon's damages. On appeal, with one judge dissenting, the court of appeals

reversed the District Court's judgment of several liability and held T. Smith and Lumar jointly and severally liable for ninety percent (100 percent less Mr. Simeon's ten percent contributory negligence) of those damages awarded Mr. Simeon which were recoverable against both defendants. The court of appeals further remitted to $600,000 the pain and suffering damages awarded Mr. Simeon.

Mr. Simeon did not attempt in any way to collect or secure his claim against potentially insolvent Lumar by effecting the seizure of Lumar's vessel, which was named as an in rem defendant in this action. If T. Smith is jointly liable with Lumar for that portion of damages awarded against both Lumar and T. Smith, T. Smith will likely not be able to recover

contribution from Lumar. Accordingly, although T. Smith is only fifty-eight percent responsible for Mr. Simeon's injuries, it faces the real prospect of paying not only its fair share of Mr. Simeon's recoverable damages, but also the share of another party to the litigation.

Since less than $130,000 of this judgment is for pecuniary damages (lost income and future medical expense), which would be paid under a several judgment, there is no sound policy reason to subject T. Smith to the general inequity of paying a portion of the judgment attributable to another party. Moreover, the application of joint liability to T. Smith and Lumar was improper where there is a different basis of recovery from each defendant, and where the plaintiff himself contributed to his

own accident. Accordingly, T. Smith seeks issuance of a writ of certiorari to review this improper and inequitable result.

## REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the application of joint liability in suits involving a Jones Act employer and the general maritime law negligence of a third party. Since the duty of care placed upon a seaman's employer is far greater than the duty imposed upon a general maritime law tortfeasor, the entry of a joint judgment ran counter to the prior decision of this Court in Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946). Furthermore, joint liability is contrary to the comparative fault principles set out by this Court.

The entry of a judgment for joint liability in a case involving defendants which were not liable for the same elements of damages under the applicable substantive law, which owed the plaintiff far different standards of care, and where the plaintiff himself was partially responsible for his injury merely compounds the inequity always present when a judgment is entered against a party for a sum greater than its percentage share of fault bears to the plaintiff's total damages.

## I. A Writ Should be Issued to Determine Whether Parties Which Owed the Plaintiff a Significantly Different Standard of Care Should Be Held to be Jointly Liable to The Plaintiff.

The decision of the court of appeals recognized that this Court has held that a

negligent defendant may not be held jointly liable with a tortfeasor whose liability arose from unseaworthiness, since the duty of an employer to provide a seaworthy vessel "rests upon an entirely different basis" from negligence. Seas Shipping Co. v. Sieracki, 328 U.S. 85, 89 (1946). By refusing to apply the Sieracki rule to the facts of this case, the court of appeals reasoned that since negligence actions under the Jones Act and negligence actions under the general maritime law are based on common law principles of negligence, that the Sieracki rule was inapplicable. However, the standard of care applied to employers under the Jones Act, 46 U.S.C. §688, has developed into such a high standard that it bears little resemblance to a common law action for negligence.

This Court has held that the Jones Act permits recovery for "even the slightest" negligence. E.g., Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521 (1957).

The plaintiff had only to show the "slightest degree of negligence" on the part of T. Smith, coupled with a "feather-weight" causation burden, for there to be liability under the Jones Act. Davis v. Hill Engineering, 549 F.2d 314, 329, 331 (5th Cir. 1977). Co-defendant Lumar, however, was held to the far less onerous standard of "exercising reasonable care", much like the common law standard applied to a tortfeasor. Cf., Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630 (1959) (where the shipowner's liability to non-crewmember was defined).

In instructing the jury on the causation burden applicable to the various defendants, the District Court advised that "[n]ow, unlike plaintiff's Jones Act claim against T. Smith & Son, in which the negligence is considered a legal cause of damage if it played any part, no matter how small, in bringing about or actually causing the injury, with plaintiff's claims against Lumar Marine, negligence is considered a legal cause of damage if it directly and in natural and continuous sequence produces, or contributes substantially to producing such damage, so it can reasonably be said except for the negligence, the injury or damage would not have occurred." (Appendix E at page A-198) As demonstrated by this jury charge, Jones Act negligence has so significantly evolved

from its common law origins that the liability of Mr. Simeon's employer in this action, T. Smith, rested upon an entirely different basis from the liability of Lumar. The decision of the court of appeals should be reviewed because it runs counter to the prior decision of this Court in Sieracki, supra.

## II. A Writ Should Be Issued to Determine Whether Joint Liability Should be Imposed on Two Defendants Where the Inequity of Casting One Party in Judgment for A Sum Greater Than Its Percentage Share of Fault Bears to the Plaintiff's Total Damages Does not Further a Significant Social Purpose.

Controlling in this case "is a doctrine in the Supreme Court, now often lost from sight, that damages in admiralty are given or withheld upon enlarged principles of

justice and equity and are within the sound discretion of the Court." Staring, Contribution and Division of Damages in Admiralty and Maritime Cases, 45 Ca. L. Rev. 304, 342 (1957), citing the Marianna Flora, 24 U.S. (11 Wheat.) 1 (1826); The Palmyra, 25 U.S. (12 Wheat.) 1 (1827). The Supreme Court not only permits, but expects the lower courts to apportion damages based on principles of justice and equity. Id. at 342-43. In this case, the District Court followed this Court's mandate by entering a several judgment. Up until the time of trial, the plaintiff did not in any way attempt to obtain security for its maritime lien claim against defendant Lumar's vessel. Although Lumar's vessel was named as an in rem defendant in the original Complaint, the vessel was never

seized, and the plaintiff did not even file a notice of claim of lien with respect to the vessel. Having slept on his rights by not obtaining security for his claim against potentially insolvent Lumar, the plaintiff sought the entry of a joint judgment against defendants Lumar and T. Smith. By "sleeping" on his maritime lien rights, the plaintiff has subjected T. Smith to potential irreparable injury. If T. Smith must pay Lumar's portion of the joint judgment, T. Smith will likely not be able to recover contribution from Lumar. Under such circumstances, it would be patently unfair and inequitable to hold defendant T. Smith jointly liable with defendant Lumar, and the District Court refused to do so.

The inequity of holding T. Smith jointly liable with Lumar has no sound policy justification where the plaintiff's economic losses for past and future wages, as well as future medical expenses, total less than $130,000 and will easily be satisfied by the several judgment entered against T. Smith. The remitted award of pain and suffering damages to the plaintiff, if accepted, totals $600,000, and may not all be collectible if a several judgment is entered. T. Smith submits that where this Court has not expressly ruled that joint liability be applied in a case involving a Jones Act defendant and a general maritime defendant,[1] principles of

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[1] The court of appeals relied upon this Court's decision in Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979), which construes the Longshore and Harbor Worker's Compensation

justice and equity mandate that the District Court's judgment of several liability be approved by this Court, and the decision of the court of appeals reversed.

T. Smith is not alone in its criticism of joint and several liability. Recently, there has been much criticism and movement away from joint liability, which is a "deep pocket" theory of liability. "Deep pocket"

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Act, 33 U.S.C.A. §901, et seq. Edmonds, in holding that a shipowner was liable for all the damages to an injured longshoreman not due to the longshoreman's own negligence, relies on the legislative history of the statute which "strongly counsels" against a proportionate fault rule. Interestingly, Justices Blackman, Marshall and Stevens, in their dissenting opinion, felt that the statements of legislative purpose are as consistent or more consistent with "a system of comparative negligence, than with a congressional assumption that the shipowner would be fully liable for the concurrent negligence of the stevedore." Id. at 279.

liability has been labelled as the "single biggest factor in causing skyrocketing liability insurance cost." Harris, NFIB-Arizona; NFIB/Arizona, Says Reducing State Income Tax Rates Will Be Top Priority for Business Owners in '87, Business Wire, December 29, 1986. "Deep pocket" liability is also blamed for magnifying the product liability insurance crisis. Oberlink, The Product Liability Monsters; Companies Are Being Crippled By A Dramatic Rise In Liability Insurance Premiums, Adweek, November 3, 1986. A "deep pocket" defendant, whose obvious success is demonstrated by its solvency and significant resources, is often held responsible for the negligence of other less resourceful defendants. This of course has hampered the development and

growth in the manufacturing industries because the product liability risks for some middle-sized manufacturers are too great. Id.

The push for reform of liability laws is already apparent at the federal level. Id. Furthermore, the American Bar Association has favored modification of the "deep pocket" practice. The New York Times, February 18, 1987, at 14, Col. 1.

The general inequity of joint liability, particularly with respect to damages for pain and suffering and other non-economic losses, has been a prime consideration of those progressive jurisdictions[2] which have engaged in tort

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[2] See, e.g., N.H. Rev. Stat. Ann. §507:7a (1986); Vt. State. Ann. tit. 12, §1036 (1986); Ka. State. Ann. §60-258 (1986); Ohio Rev. Code §2315.19 (A)(2) (1986); Nev. Rev. Stat. §41.141(3) (1975);

reform by moving toward a system under which liability for damages is apportioned to those whose negligence caused it in direct proportion to their respective fault. For example, the State of Florida, recognizing the inequities that can result when multiple tortfeasors are held to be jointly liable, eliminated joint liability for economic damages caused by two or more persons when the fault of a party does not equal or exceed the fault of the claimant, and totally eliminated joint liability for non-economic damages.[3]

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Tex. Rev. Civ. Stat. Ann. Art. 2212(a) (Vernon Supp. 1982,83, 85); Or. Rev. Stat. §18.485 (1983); 42 Pa. Cons. Stat. §7102(b); 8322 et seq. Cal. Civ. Code §1431.1 (1986); La. Civ. Code art. 2324 (1987); Fla. Stat. Ann. §768.81 (1986).

[3] Florida Stat. Ann. §768.81(3) reads in its entirety as follows:

Apportionment of Damages. In cases

This Court adopted a rule of comparative negligence in maritime collision cases in United States v. Reliable Transfer Co., Inc., 421 U.S. 397 (1975). In Reliable Transfer, the Court noted that the Supreme Court was the appropriate vehicle for effectuating equitable changes in admiralty law stating:

> The judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime, and 'Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law.'

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to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability; provided that with respect to any party whose percentage of fault equals or exceeds that of a particular claimant, the court shall enter judgment with respect to economic damages against that party on the basis of the doctrine of joint and several liability.

Id. at 411 (quoting, Fitzgerald v. United States Lines Co., 374 U.S. 16, 20 (1963)).

A rule of comparative negligence is applied in multiple defendant cases where one defendant settles with the plaintiff prior to trial. Leger v. Drilling Well Control, Inc., 592 F.2d 1246 (5th Cir. 1979). The fundamental purpose of comparative negligence is to assign responsibility and liability for damage in direct proportion to the amount of negligence of each of the parties. W. Prosser and P. Keeton, Torts, §67, pg. 475 (5th ed. 1984). Where the plaintiff has been negligent, and such negligence has contributed to the cause of his injuries, the plaintiff is no longer in a more equitable position than the negligent defendants. Thus, in this case, where the

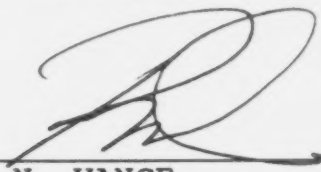
plaintiff himself was negligent, the policy reason for requiring a solvent defendant rather than a plaintiff to bear the portion of the loss attributable to insolvent or judgment-proof defendants no longer exists.

## CONCLUSION

Perpetuation of the court of appeals ruling in Simeon with respect to joint liability of a Jones Act defendant and a general maritime defendant will have a negative impact on the viability of comparative negligence as a vehicle to establish equity in the apportionment of judgments. Therefore, a writ of certiorari should be issued to determine whether joint liability is appropriate considering this Court's adoption of comparative fault principles, where the plaintiff has

contributed in part to his own injuries, prejudiced the solvent defendant by "sleeping" on his maritime lien rights, and where the entry of a several judgment will fully compensate the plaintiff for his economic losses.

Respectfully submitted,



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